UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST LITIGATION	)	
	) Misc. No. 99-197 (TFH)	
	) MDL No. 1285	
THIS DOCUMENT RELATES TO: ALL CLASS ACTIONS	)	

FILED

JUL 16 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION Re:
PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Pending before this Court is the petition of Class Plaintiffs and their counsel ("Petitioners") for the award of attorneys' fees and reimbursement of expenses in the above captioned actions. Based upon careful review of the Petition, the Settlement Agreement, Class Plaintiffs' Proposed Findings of Fact, Class Plaintiffs' Proposed Conclusions of Law, Class Counsels' supplemental and amended submissions, and the entire record herein[1], the Court will grant the Petition in part, awarding $123,188,032 in attorneys' fees, plus interest. However, the Court will defer ruling on the request for expenses pending submission of further documentation as ordered herein.

I. BACKGROUND

The instant Petition seeks reimbursement for services provided and expenses incurred by Class Plaintiffs' counsel in relation to the negotiation of a Settlement Agreement ("Settlement" or "Agreement") that resolves antitrust claims pertaining to two separate classes of purchasers of

[1]The record in this case includes extensive and detailed declarations of class counsel specifying the hours and substance of their services rendered in connection with this action, as well as detailed biographies of these counsel explaining their experience and expertise in this type of litigation.

vitamin products, one comprised of purchasers of vitamin products other than choline chloride ("Vitamin Products"),[2] and the other comprised of purchasers choline chloride.

On November 23, 1999, this Court preliminary approved a Settlement Agreement between the Class Plaintiffs[3] and the Settling Defendants,[4] conditionally certified a Vitamin Products Class and a Choline Chloride Class, authorized the form and manner of class notice, and scheduled a Rule 23(e) hearing on the fairness of the Settlement. On March 28, 2000, this Court granted final approval of the Settlement pursuant to Fed. R. Civ. P. 23. Only three objections to the Settlement were filed,[5] none of which were filed on behalf of a class member.[6]

The Settlement resolved class claims against the Settling Defendants in connection with the alleged price fixing of Vitamin Products and choline chloride sold for delivery in the United

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[2]For purposes of this opinion, Vitamin Products refers to vitamins A, C, E, B1 (thiamin), B2 (riboflavin), B5 (calpan), B6, B9 (folic acid), B12 (cyanocobalamine pharma), H (biotin), astaxanthin, canthaxanthin, and beta-carotene, as well as blends and premixes of the foregoing.

[3]Petitioners include attorneys from 57 law firms representing Class Plaintiffs. There are almost 4,000 members of the class, Co-lead Decl. ¶ 42, 233 of whom opted out of the Vitamin Products settlement class and 200 of whom opted out of the Choline Chloride settlement class. Sincavage Supp. Decl.

[4]Settling Defendants comprise seven international vitamin manufacturers and their affiliates, nineteen companies in all. The companies include Hoffmann-LaRoche, Inc., Roche Vitamins, Inc., F. Hoffmann-LaRoche Ltd., Rhone-Poulenc, Inc., Rhone-Poulenc Animal Nutrition, Inc., Rhone-Poulenc Rorer Pharmaceuticals, Inc., Rhone-Poulenc S.A., BASF Corporation, BASF AG, Hoescht Marion Roussel, S.A., Eisai Co., Ltd, Eisai U.S.A., Inc., Eisai, Inc., Daiichi Pharmaceuticals Co., Ltd, Daiichi Pharmaceuticals Corporation, Daiichi Fine Chemicals, Inc., Takeda Chemical Industries, Ltd., Takeda U.S.A., Inc., and Takeda Vitamin & Food USA, Inc.

[5]Objections were raised by Nutra-Blend, the Cargill plaintiffs, and the Tyson plaintiffs. All three objections pertained to the most-favored-nations ("MFN") clause of the Settlement. See infra note 8 (explaining the MFN clause).

[6]The single objection filed on behalf of a class member, Dairy Farmers of America, was withdrawn.

States.[7] At the time of the original agreement, the Settlement was projected to secure a class recovery rate of approximately eighteen to twenty percent of the dollar value of the class purchases of vitamin products from the Settling Defendants. Based upon figures available at final distribution, this recovery rate has risen to nearly twenty-three percent. Amended Prop. Findings at 3. This percentage recovery rate is in the highest tier of settlements for price-fixing class actions. The Settlement is an all-cash settlement with no deferred payments. The Settlement includes, inter alia, injunctive relief,[8] a most-favored-nations ("MFN") provision,[9] a waiver of claims to quantum meruit or other fees in connection with the resolution of the opt-out claims,[10] and an agreement by Class Plaintiffs to limit fees requested in connection with the

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[7]The Settlement pertains only to vitamins sold in the United States and does not dispose of claims pertaining to foreign sales. Nor does the Settlement resolve claims pertaining to indirect purchasers of the above enumerated vitamin products. The Settlement resolves claims for purchases totaling approximately $1.4 billion. Mem. Supp. Petition at 2.

[8]The Settlement prohibits Settling Defendants from engaging in horizontal conduct constituting a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, for a period of three years from the Settlement date. Settlement ¶ 25.

[9]The MFN provision covers a two year period in which the Settling Defendants guarantee settling class members the benefit of more favorable settlement terms that Settling Defendants establish with any opt-out plaintiffs. Settlement ¶ 22. The MFN clause lasts until the earlier of (1) November 3, 2001 (two years after execution of the Settlement Agreement); (2) the date of a final pretrial order in an opt-out plaintiff's action; or (3) 30 days prior to a trial date in an opt-out plaintiff's action. Id. ¶ 22(g). The MFN clause contains two exceptions: (1) an opt-out plaintiff may settle with a Settling Defendant, as many have already done, at the same or a lesser settlement percentage than the percentage at which the particular defendant settled with the Vitamin Products Class, plus up to 17.65% for attorneys' fees, Settlement ¶ 22(c), (e); and (2) a larger payment to an opt-out plaintiff does not trigger the MFN clause if it is determined that the opt-out plaintiff is in a materially different situation from the class members. Id. The MFN clause in inapplicable to the choline chloride claims. Settlement ¶ 17(e).

[10]Settlement ¶ 13(b).

settled claims to the amount of the respective attorneys' fee funds.[11] The Settlement also established four separate funds: (1) an initial settlement fund of $1,050,137,127 for vitamin products other than choline chloride ("Vitamin Products Settlement Fund");[12] (2) a fund of not less than $5 million for choline chloride ("Choline Chloride Settlement Fund");[13] (3) an attorneys' fee fund of an amount not to exceed $122,438,032 for claims relating to vitamins products other than choline chloride ("Vitamin Products Fee Fund"); and (4) an attorneys' fee fund of an amount not to exceed fifteen percent of BASF AG's total contribution to the Choline Chloride Settlement Fund for claims relating to choline chloride ("Choline Chloride Fee Fund").[14]

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[11]Plaintiffs' counsel agree not to seek attorneys' fees in excess of either the Vitamin Products Fee ($122,438,032), Settlement ¶ 13(b), or the Choline Chloride Fee, Settlement ¶ 17(g) (assessed as fifteen percent of BASF's total contribution to the Choline Chloride Settlement Fund), respectively. Defendants agree not to oppose any request that does not seek approval of attorneys' fees in excess of the agreed upon amounts.

[12]Settlement ¶ 7. The initial contribution of $1.05 billion is subject to reduction in proportion to the percentage of vitamin products purchases during the relevant periods made by opt-out plaintiffs. The current actual payment to class plaintiffs is approximately $242,000,000.

[13]Settling Defendant BASF AG is the sole defendant to settle choline chloride claims as part of the Settlement Agreement. BASF AG is required to contribute up to an additional $20 million (for a total of up to $25 million) to the Choline Chloride Fund if the Class Plaintiffs are unable to secure full relief against other non-settling choline chloride defendants. Settlement ¶ 17(c). This condition has not yet been satisfied.

[14]Unlike the vitamin products fee, which is set at a maximum dollar amount of $122,438,032, the amount of attorney's fees related to choline chloride is based on a maximum percentage. Petitioners state that the Settlement created a Choline Chloride Fee Fund of $750,000, which is fifteen percent of the minimum $5,000,000 Choline Chloride Settlement Fund payment due by BASF. However, BASF may still be subject to additional liability for attorneys' fees, depending on whether BASF is required to make additional contributions to the Choline Chloride Settlement Fund. See supra note 12.

Petitioners seek approval of attorneys' fees in the amount of $122,438,032 from settlement of claims relating to vitamin products and $750,000 resulting from settlement of claims relating to choline chloride. The total fee request, as agreed to by the Settling Defendants, is $123,188,032, plus interest.[15] Petitioners assert that if this Court denies payment or approves attorneys' fees in an amount less than the maximum amount agreed to, i.e., a total of $123,188,032, the Settlement provides for modification of the quantum meruit waiver.[16] Such modification would permit Class Plaintiffs' counsel to seek fees in connection with the resolution of opt-out claims in an amount equal to the fees not awarded by the Court.[17]

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[15]The proposed fee represents different percentages of the total fund, depending on the amounts included in calculating the amount of the fund. See discussion infra Part C.1.

[16]The Settlement provides:

> In the event that (i) the Court approves an attorneys' fee pursuant to subparagraph (a) of this paragraph in an amount less than $122,438,032 . . . and (ii) one or more Opt-Out Plaintiffs enter into settlements with or obtain judgments against the Settling Defendants, the Settling Defendants agree that Class Counsel may apply to the Court for an additional award of attorneys' fees . . . .

Settlement ¶ 13(c).

[17]Petitioners are correct in their assertion regarding this outcome if the Court approves payment of attorneys' fees for vitamin products in an amount less than $122,438,032 (as contrasted to the amount of $123,188,032, which combines the Vitamin Product and Choline Chloride Fee Funds). The Settlement does not include a modification provision regarding approval of fees in an amount less than the maximum Choline Chloride fee liability, i.e., fifteen percent of BASF AG's total contribution to the Choline Chloride Settlement Fund. The choline chloride Settlement provisions, Settlement ¶ 17, waive Plaintiffs' quantum meruit claims, but do not provide for modification of this waiver in the event that this Court does not approve the amount determined as BASF's maximum liability, i.e., fifteen percent of BASF's contribution or currently $750,000. The choline chloride Settlement provisions do not incorporate by reference the vitamin products waiver modification provisions. Nor does the vitamin products waiver provision expressly encompass the award of fees related to choline chloride claims. To the contrary, while the Settlement elsewhere refers to the separate funds conjunctively, e.g., Settlement ¶ 12, the vitamin products quantum meruit provision expressly mentions vitamin

Petitioners also submit that they have incurred $3,260,744.35 in expenses for which they seek reimbursement from the Vitamin Products and Choline Chloride class funds.[18] Pursuant to the Settlement, attorneys' fees are to be paid from the separate escrow accounts funded by Defendants, Settlement ¶¶ 13, 17(g), and expenses may be paid from the respective Vitamin Products and Choline Chloride Settlement Funds.[19] Settlement ¶ 12.

II. DISCUSSION

This Court has a duty to ensure that Petitioners' claim for attorneys' fees is reasonable. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (discussing the duty of federal courts to ensure the reasonableness of claims for attorneys' fees); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993). The fact that the current fee request is unopposed does not obviate the need for this Court to assess the reasonableness of the fee request. See In re Cendant Corp. Prides Litig., 243 F.3d 722, 730 (3d Cir. 2001) (stating that the duty of a court to ensure that fees are proper "exists independently of any objection"). "Special problems exist in assessing the reasonableness of fees in a class action suit since class members with low individual stakes in the outcome often do not file objections, and the defendant who contributed to the fund will usually have no interest in how the fund is divided between the plaintiffs and class counsel." Swedish Hosp., 1 F.3d at 1265; see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab.

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products, without referencing choline chloride claims. Settlement ¶¶ 13(a)-(c).

[18]Ninety percent of this amount has been allocated by Petitioners as expenses related to the Vitamin Products litigation; ten percent is allocated as expenses related to the Choline Chloride litigation.

[19]Regarding the payment of expenses, the Settlement provides that expenses are not borne by Defendants, but rather may be paid proportionally from the Vitamin Products and Choline Chloride Funds. Settlement ¶ 12.

Litig., 55 F.3d 768, 819-20 (3d Cir. 1995); Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991).

A. Methods Used by Courts to Assess the Reasonableness of Attorneys' Fees

A majority of courts utilize one of two approaches to assess the reasonableness of requests for attorneys' fees. The approach utilized is often contingent upon whether the case is a statutory fee shifting case or a common fund case.[20] In statutory fee shifting cases, courts frequently employ the lodestar method. In common fund cases, many jurisdictions apply the percentage of recovery method. However, some jurisdictions require the use of the lodestar method, even in common fund cases; some jurisdictions leave the matter to the discretion of the reviewing court; and others advocate using the percentage recovery method, but advocate cross checking the reasonableness of the fees against the lodestar method. As discussed more fully below, the instant Settlement is not a true common fund case and presents attributes that weigh in favor of application of either method. However, the Court determines that it is appropriate to regard the instant Settlement as a constructive common fund. Because this Circuit requires the percentage of recovery method in common fund cases, the Court will employ the percentage of recovery approach in this case.

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[20]Under the American Rule, litigants generally bear their own expenses of litigation. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). There are two exceptions to this general rule that are germane to this case, i.e., fee shifting statutes and common fund cases. See Brytus v. Sprang & Co., 203 F.3d 238, 241-42 (3d Cir. 2000). The Tenth Circuit has made a further distinction, acknowledging the difference between common fund and common benefit cases. See Rosenbaum v. Macallister, 64 F.3d 1439, 1444 (10th Cir. 1995). As explained by the Tenth Circuit, "The common benefit doctrine originates from the common fund exception, under which 'the successful plaintiff is awarded attorney fees because his suit creates a common fund, the economic benefit of which is shared by all members of the class.'" Id. at 1444 (quoting Aguinaga v. United Food and Commercial Workers Int'l Union, 993 F.2d 1480, 1482 (10th Cir. 1993)) (internal quotation and citation omitted).

1. The Lodestar Method

In assessing the reasonableness of fees within the context of a fee shifting statute, courts generally apply the lodestar method. Under this method, a court first determines the hours reasonably expended by counsel. See Court Awarded Attorney Fees, Report of the Third Circuit Task Force (Arthur R. Miller, Reporter), reprinted in 108 F.R.D. 237, 243 (1985). The court next multiplies the number of compensable hours by a reasonable hourly rate.[21] See id. This computation yields the "lodestar" of the court's determination. See id. The lodestar might then be increased or decreased by a "multiplier" based upon consideration of the risks or contingencies of the particular case, as well as the quality of the attorneys' work. See id. "The lodestar method . . . is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 333 (3d Cir. N.J. 1998). Opponents of this method argue that the lodestar approach induces counsel to prolong litigation, engage in unnecessary work, and agree to less than optimal settlements. See In re Auction Houses Antitrust Litig., 197 F.R.D. 71, 76 (S.D.N.Y. 2000).

2. Percentage of Recovery Method

While the lodestar method is firmly entrenched in statutory fee shifting cases, courts have differed in their approach to assessing the reasonableness of fee requests in common fund cases.

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[21]Hourly rates may vary according to the attorneys' experience, reputation, practice, and qualifications.

Some circuits apply the lodestar method,[22] some apply a percentage of recovery method,[23] and other circuits first apply a percentage of recovery method, but then cross check the outcome against a lodestar computation.[24] Under a percentage of recovery method, a court assesses the reasonableness of the attorneys' fees based upon the percentage of the settlement fund that the fee comprises. As articulated by the Supreme Court, the criteria for application of the common fund doctrine are satisfied when "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf." Boeing Co. v. Van Gemert, 444 U.S. 472, 479 (1980).

A growing number of courts, including those in this Circuit, recently have embraced the percentage-of-recovery method in common fund cases.[25] See Swedish Hosp., 1 F.3d at 1267,

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[22]See e.g., In re Bausch & Lomb Sec. Litig., 183 F.R.D. 78 (W.D.N.Y. 1998) (explaining that the Second Circuit mandates the lodestar approach in common fund cases); Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 850 (explaining that the Fifth Circuit uses the lodestar to assess the reasonableness of attorneys' fees in class action suits).

[23]See e.g., In re Continental Il. Sec. Litig., 962 F.2d 566, 572-73 (7th Cir. 1992) (stating preference for percentage method); Rosenbaum, 64 F.3d at 1445 (articulating a preference for percentage of recovery method in common fund cases); Camden I Condo Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991) (mandating percentage method in common fund cases). However, while endorsing the percentage of recovery method for common fund cases, the Tenth Circuit has found the method to be inappropriate for analyzing common benefit cases and instead applies the lodestar method to such cases. See Rosenbaum, 64 F.3d at 1447.

[24]See e.g., Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000) (encouraging a cross check on the reasonableness of the requested fee, but holding that both the lodestar and percentage recovery methods are appropriate); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 (3d Cir. 2000) (suggesting that district courts cross check percentage awards against the lodestar method); Bebchick v. Washington Metro. Area Transit Comm'n, 805 F.2d 39 (D.C. Cir. 1986). But see Swedish Hosp., 1 F.3d 1261 (relying not only on Blum, but also on the perceived inefficiencies inherent in the lodestar method to support its decision to discard both the lodestar and cross check method and instead apply the percentage recovery method.).

[25] Petitioners assert that the First, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. circuits have endorsed the percentage of recovery method in common fund cases. Conclusions ¶

1269 (endorsing the percentage of recovery method as more accurately reflecting the economics of litigation practice). Proponents find the percentage of recovery method attractive "because it directly aligns the interests of the Class and its counsel for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." In re Am. Bank Note Holographics, Inc. Sec. Litig., 127 F. Supp. 2d 418, 431-32 (S.D.N.Y. 2001). However, despite this and other circuits' preference for the percentage of recovery method, courts have acknowledged the utility of the lodestar method in instances in which the amount of the common fund is difficult to ascertain, In re Gen. Motors, 55 F.3d at 821; Cullen v. Whitman Medical Corp., 2000 U.S. Dist. LEXIS 14434, at *20 (E.D. Pa. 2000), or where the case is not otherwise easily slotted into the common fund paradigm, Osher v. SCA Realty I, 945 F. Supp. 298 (D.D.C. 1996). Opponents of the method also note that the percentage of recovery approach may "lead the plaintiffs' attorney to settle the case prematurely as soon as counsel's opportunity costs begin to mount." In re Auction Houses, 197 F.R.D. at 77.

B. Determining Whether to Utilize the Lodestar or Percentage Recovery Method

In order to determine whether to utilize the lodestar or percentage of recovery method to assess the request for fees in the instant Motion, the Court must decide how to classify this action. Petitioners' memoranda make clear that they prefer the Court to treat this as a common fund case and thus utilize the percentage of recovery method. If the Settlement fit neatly into

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10, n.1. But see Goldberger, 209 F.3d 43, 49 (noting six circuits – First, Sixth, Seventh, Eighth, Ninth, and Tenth – which have "reaffirmed that district courts enjoy the discretion to use either the lodestar or the percentage method"); McLendon v. The Continental Group Inc., 872 F. Supp 142, 151 (D.N.J. 1994) (citing Second, Ninth, and Tenth Circuits as allowing district courts the choice of methodology in common fund cases). However, some of these courts employ a cross-check method as a safeguard. See supra note 24.

either the statutory fee shifting or common fund paradigm, the Court's task would be greatly simplified. However, while the Settlement shares many characteristics with common fund cases, the Court recognizes that this is not a true common fund case. In a true common fund case, the attorneys' fees would be taken from a fund shared in common with class plaintiffs; therefore, the amount recovered by plaintiffs is reduced by the amount awarded in attorneys' fees. In the case at hand, the parties established separate attorneys' fee funds for both Vitamins Products and Choline Chloride.

When confronted with separate funds for class recovery and attorneys' fees, other circuits have labeled the case as a "constructive common fund"[26] or a "hybrid"[27] case but have differed in their application of the appropriate methodology for assessing the reasonableness of the attorneys' fees. The inconsistency is not surprising, as such cases possess attributes that weigh in favor of applying either the lodestar or percentage of recovery methods. In making the determination as to which method to utilize, the Court finds the decisions discussed below to be instructive on the matter.

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[26] See e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 820 (3d Cir. 1995), cert. denied, 516 U.S. 824 (1995) (regarding case as constructive common fund where defendant was to pay attorneys' fees).

[27] See e.g., Brytus, 203 F.3d at 243 (dealing with a statutory fee case, but labeling as a "hybrid case" a situation in which a common fund was created but from which attorneys' fees need not be deducted); see also Brytus, 203 F.3d at 247-50 (Stapelton, J., dissenting) (explaining that "in hybrid cases which share the attributes of both a statutory fee case and a common fund case, it is within the district court's discretion to . . . determine[] . . . whether the case 'more closely resembles ' a common fund case or a statutory fee case") (citing General Motors, 55 F.3d at 822; McLendon v. The Continental Group, Inc., 872 F. Supp. 142, 151 (D.N.J. 1994)).

In Petruzzi's, Inc. v. Darling-Deleware Co., Inc, the court was faced with a settlement that presented attributes of both statutory fee and common fund cases. Petruzzi's, 983 F. Supp. 595, 604 (M.D. Pa. 1996). In deciding whether the case more closely resembled a statutory fee or common fund case, the Petruzzi's court explained that the class members' recovery was not affected by the fee award; therefore, the case did not present the typical conflict of interest between class counsel and class members that underlies the application of the percentage of recovery method. See id. (citing In re Gen. Motors, 55 F.3d at 821). However, in explaining the "economic reality" of the situation, the court recognized that the agreement to pay settlement claims and attorneys' fees yielded a calculable amount that could fairly be regarded as a constructive common fund. See id. Despite labeling the case as a constructive common fund, the court ultimately employed the lodestar method to assess the reasonableness of the attorneys' fees. In making that decision, the court first distinguished the case before it from the situation presented in General Motors, noting that unlike the Petruzzi's case, the General Motors defendants did not contest the fee award. In discussing General Motors, the court stated that fee disputes are best settled by application of the lodestar method. However, the principle reason cited by the Petruzzi's court in making its determination was the difficulty in assigning a reasonable value to the settlement. The court grappled with assigning a value to the settlement, noting the "absence of controlling authority on whether the percentage of attorneys' fees is to be paid on the basis of the actual recovery or on the basis of the potential conferred by the settlement." Id. In weighing the merits of both options, the court postulated that "[b]oth positions suffer from the same fundamental flaw – they ascribe unrealistic values to the benefit conferred on the class by the settlement agreements." Id. The court reasoned that the settlement would not have yielded anything close to 100% recovery; however, the court also noted that the

benefit to the class was greater than the amount of claims actually paid. The court ultimately concluded that "the lodestar approach is preferable where . . . there is a substantial divergence between the actual recovery and the potential benefit; the benefit is not reasonably calculable; and the defendant who is obligated to pay the fee contests class counsel's claim." Id. at 606.

This Court finds itself confronted with a similar dilemma in the instant action. As discussed more fully below, there are several computations that the Court could utilize to determine the amount of the common fund. However, unlike the Petruzzi's court, this Court does not believe that the difficulty in ascribing a value to the Settlement necessarily weighs in favor of application of the lodestar method. While assigning a value to the Settlement is difficult, it is not impossible. And with respect to the Petruzzi's court's concerns regarding the payment of fees directly to counsel by defendants, other courts have regarded such arrangements as a constructive common fund, included the amount of the attorneys' fees in that fund, and have applied the percentage recovery method. For example, in Johnston v. Comerica Mortgage Corp., 83 F.3d 241 (8th Cir. 1996), the Eighth Circuit considered two questions: "(1) whether the district court abused its discretion by applying the lodestar approach to the fee analysis; and (2) whether the district court abused its discretion by refusing to allow counsel to present time records after the court had declined to allow fees based on benefit to the class." 83 F.3d at 242. The district court had determined that the percentage of recovery method was inappropriate because the attorneys fees were to be paid directly by the defendants and thus the fees did not come from a common fund. See id. at 245. On appeal, the Eighth Circuit stated its disagreement with the lower court's rationale, stating that:

> Although under the terms of each settlement agreement, attorneys fees technically derive from the defendants rather than out of class recovery, in essence the entire settlement amount comes from the same source. The award to the class and the

> agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are best still viewed as an aspect of the class' recovery.

Id. at 246 (citing In re General Motors, 55 F.3d at 821). The court determined that "the direct payment of fees by defendants should not be a barrier to the use of the percentage of the benefit analysis." Id. The district court was also concerned that the value of the settlements was too speculative to value. See id. at 245. In addressing the lower court's concerns regarding the speculative nature of the settlement funds, the appeals court determined that it was not an abuse of discretion to utilize the lodestar method, based upon the particular facts, but nonetheless noted the disadvantages of that method. See id. at n.8.

Moreover, in In re Cendant Corp. Prides Litig., the Third Circuit vacated the district court's award of fees because the lower court had failed to make its determination in conformity with Third Circuit precedent and had failed to present a thorough analysis of its fee determination. In re Cendant Corp., 243 F.3d at 734-35. However, the circuit court did acknowledge that the percentage of recovery method was appropriate, even though the case was "not a traditional common-fund case." Id. at 734. In distinguishing the action from traditional common fund cases, the court noted that "the unclaimed portion of the settlement fund is returned to [the defendant]" and the plaintiffs were not affected by the attorneys' fee award. Id.

However, the Court is aware that not all courts have taken this approach. In Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991), the court discussed a settlement that provided for fees to be paid under a "clear sailing" agreement.[28] The First Circuit began its

[28] The court defined a clear sailing agreement as "one where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." Weinberger, 925 F.2d at 520 n.1.

analysis by addressing the lower court's intimation that a court need not review an undisputed fee. The appellate court first determined that a district court should be required to assess the reasonableness of the requested fees, notwithstanding cases where fees are neither paid from nor diminish a common fund.[29] See id. at 522. Then, after discussing the difficulties in analyzing fees in the context of class action settlements, the court upheld the lower court's use of the lodestar method, submitting that "the lodestar may well add measurably to the likelihood of fairness where fees are sought pursuant to a clear sailing agreement." Id. at 526. The court did acknowledge the preference of many other courts to utilize the percentage of recovery method in common fund cases, but found such situations to be inapposite due to what it perceived as a lack of a common fund in the case. See id. at 526, n.10.

The Court determines that it is appropriate to treat this case as a constructive common fund despite the fact that the fees in the instant action are to be paid by defendants and despite the existence in this Settlement Agreement of a clear sailing provision. In support of this decision, the Court notes that in those circuits in which courts have the discretion to apply either the lodestar or percentage recovery methods, a primary reason for application of the lodestar is the difficulty of assigning a value to the common fund. In the instant action, Petitioners have proposed various formulae for ascertaining the amount of the common fund. Under each of these proposed methods, the value of the fund is readily calculable. The difficulty lies in choosing which formulation to use in determining the amount of the fund. In reviewing the approaches

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[29] The court noted that it used the term "common fund' to refer not only to classic common fund situations, but also common benefit cases. Id. at 522 n.6. In explaining why clear sailing agreements require "heightened judicial oversight", the court explained that "[s]uch [agreements] . . . deprive[] the court of the advantages of the adversary process[,] . . . render[] it improbable that class members will come forward to challenge the reasonableness of the requested fee[, and bind] the payor . . . by contract not to contest the application." Id. at 525.

taken by other courts, the Court is mindful of the Supreme Court's admonition in Hensley v. Eckerhart that the evaluation of attorneys' fees "should not result in a second major litigation." 461 U.S. 424, 437 (1983). This would certainly be the result should the Court choose to employ the lodestar method. The Court is also aware of the preference in this Circuit for utilizing the percentage of recovery method in common fund cases. See Swedish Hosp. 1 F.3d at 1269 (stating that the percentage recovery method "more accurately reflects the economics of litigation practice"). Following the reasoning of Swedish Hosp., the Court accordingly will apply the percentage of recovery method to determine the reasonableness of the fee request. However, this determination does not end the inquiry, for the Court must still determine the amount of the common fund in order to determine what percentage the fee request comprises of the fund.

C. Applying the Percentage of Recovery Method

1. Determining the amount of the "common fund"

Having determined that it is appropriate to regard the instant Settlement as a constructive common fund and thus apply the percentage of recovery method, the Court must still establish the appropriate method for calculating the dollar amount of the "common fund."[30] This analysis is complicated by the stark difference in the maximum agreed to liability of Defendants, $1.05 billion, as contrasted to the actual recovery by Plaintiffs, approximately $242,000,000. The Court must also consider the differences in the Settlement provisions relating to the Vitamins

[30] It is noteworthy that neither class members nor Settling Defendants oppose this Petition. While the parties' mutual assent (or at least lack of opposition) to the fee request is a factor for this Court to consider in assessing the reasonableness of the fee, the parties' agreement is not dispositive as to the issue. See In re Newbridge Networks Sec. Litig., No. 941678, 1998 WL 765724 (D.D.C. Oct. 22, 1998). Therefore, the ratio of Petitioners' recovery to the overall fund becomes a critical factor in assessing the reasonableness of the fee.

Products class as opposed to the Choline Chloride class, a distinction not made by Petitioners. The analysis is even further involved because the Court must make a determination as to what portion, if any, of the payments to opt-out plaintiffs can be fairly characterized as comprising part of the common fund for the purposes of the instant Petition. In addition, the Court must determine whether the Petitioners' fees are to be regarded as comprising part of the common fund.

a. Maximum settlement liability

Petitioners first urge this Court to regard the total amount of the common fund as the initial maximum settlement liability of the Defendants. Under this theory, the common fund would consist of $1,178,325,159. This includes the Vitamin Products Settlement Fund of $1,050,137,127, the Vitamin Products Fee Fund of $122,438,032, the Choline Chloride Settlement Fund, presently $5,000,000, and the Choline Chloride Fee Fund of $750,000. Under this tabulation, the requested fee of $123,188,032 would comprise approximately 10.5 percent of the common fund.

In Boeing, the Supreme Court upheld an award of fees that was based upon the total reversionary fund available to the class rather than the amount actually recovered. See Boeing, 444 U.S. at 480-81. However, the Court noted that Boeing did not present an opportunity to comment as to whether the common fund doctrine would apply in a situation where a defendant was required simply to give security against all potential claims. See id. at 481 n.5. The Supreme Court commented on Boeing in its denial of certiorari in Int'l Precious Metals Corp. v. Waters, 120 S. Ct. 2237 (2000). In the Court's statement regarding the denial of certiorari, Justice O'Connor noted that, "We had no occasion in Boeing to address whether there must at least be some rational connection between the fee award and the amount of the actual distribution

to the class." Id.[31] The Supreme Court further cautioned that failure to make such an inquiry could have "several troubling consequences." Id. The Court explained that denial of certiorari was based in large part on the fact that petitioners had agreed not to challenge an application for fees within the agreed upon range established by the settlement and had thus waived any right to challenge the reasonableness of the fee. However, the Court remarked that "the importance of the issue counsels in favor of granting review in an appropriate case." Id. at 2338.

In the instant action, the initial Settlement provided for a maximum liability of $1.05 billion; however, the actual pay out to class members is currently $242,000,000. This difference between maximum liability and actual payout to class would seem to fall within the gray area described in Boeing and Metals Corp. Therefore, the Court will assess alternatives for valuing the amount of the common fund.

b. Actual recovery

Petitioners present this Court with two additional options for calculating the total fund. Both of these alternatives are based upon an actual recovery amount, but differ in regard to inclusion or exclusion of payments made to opt-out plaintiffs.

i. Inclusion of Opt-Out Payments

First, Petitioners suggest that this Court assess actual recovery as approximately

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[31] In Metals Corp., the district court approved fees that were more than twice the amount of class members' actual recovery. The Supreme Court acknowledged that the circuits are split as to whether to base fee awards on the actual payout or the reversionary fund amount. See Metals Corp., 120 S. Ct. at 2238, (comparing Strong v. BellSouth Telecomms., Inc., 137 F.3d 844, 852 (5th Cir. 1998) (finding no abuse of discretion where district court based fee award on actual payout rather than reversionary fund) with Williams v. MGM-Pathe Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997) (abuse of discretion for district court to base its award on actual distribution to class)).

$665,000,000. This figure includes the actual recovery by this Settlement class, $242,000,000; the combined Vitamin Products and Choline Chloride Fee Attorneys' Fee Funds, $123,188,032; and payments that have or will be made to opt outs and their attorneys who subsequently settled on essentially the same terms as the settlement class, $300,000,000. Under this proposed valuation, Petitioners' recovery comprises approximately 18.5% of the common fund.

The Court is confronted with a number of difficulties should it choose to include payments to opt-outs in the common fund. It is clear that the Supreme Court has approved the awarding of fees in instances where a plaintiff has sued and created a benefit for a class, even though the plaintiff was not suing on behalf of the persons who subsequently benefitted from the stare decisis effect of the litigation. See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("to have allowed the others to obtain full benefit from the plaintiff's efforts without requiring contribution or charging the common fund for attorney's fees would have been to enrich the others unjustly at the expense of the plaintiff"). "The underlying justification for attorney reimbursement from a common fund, as explained by the Supreme Court in three early cases, is that unless the costs of litigation were spread to the beneficiary of the fund they would be unjustly enriched by the attorney's efforts." Swedish Hosp., 1 F.3d at 1265 (discussing Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939), Central Railroad & Banking Co. of Ga. v. Pettus, 113 U.S. 116 (1885), and Trustees of the Internal Improvement Fund v. Greenough, 105

U.S. 527 (1882)).[32]

The articulated rationale for creating and broadening the common fund exception is to spread the cost of litigation among those who benefit from an attorney's work. However, the cases cited above dealt with instances in which subsequent putative plaintiffs would recover from a fund or from ascertainable and defined assets of the defendants. In the instant action, the opt-out plaintiffs are not recovering from the same funds as the original settling plaintiffs. Nor are Petitioners asking the Court to assess part of their fees against the funds recovered by opt-out plaintiffs. While Petitioners' proposed method is not a completely illogical extension of the common fund doctrine, the Court nonetheless does not elect to utilize this method due to the number of difficulties inherent in this proposed valuation method. It is certainly true that Petitioners have laid the groundwork for subsequent opt-out settlements. But as noted above, while many of the opt-out settlements have been structured on essentially the same terms as those of the original Settlement, the opt-out plaintiffs' recovery is not derived from the same common fund. In addition, opt-out plaintiffs have retained their own counsel, who must also be compensated, which would in essence require this Court to double count the amount of the opt-

[32]In Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882) and Central Railroad & Banking Co. of Ga. v. Pettus, 113 U.S. 116 (1885), the Supreme Court recognized "that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing, 444 U.S. at 478. In Hall v. Cole, 412 U.S. 1 (1973), the Court explained how Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) extended the rationale of Greenough and Pettus to award fees to a plaintiff who had not sued as a representative of a class, but nonetheless "established the right of others to recover out of specific assets of the same defendant through the operation of stare decisis." Hall, 412 U.S. at 7, n.7.

out recoveries. Even if only a partial amount of these opt-out settlements can be fairly attributed to the work of Petitioners, the Petition suggests that the Court include the full value of opt-out settlements in the current common fund. The Petition does not present the Court with alternative methods for deriving an appropriate figure, and it is not a calculation that the Court can accurately undertake on its own based upon the current record.

In addition to the aforementioned difficulties with including payments to opt-out plaintiffs in the amount of the common fund, the Court is troubled by the prospect of including in the fund an amount that is speculative and subject to change. As evidence of the speculative nature of the opt-out claims, the Court need only look to Petitioners' request that the assessment be based upon "settlements [that] have or will result in payments that may be estimated as in excess of $300 million." Amended Prop. Findings at 3. Without certainty as to the actual and final recovery of opt-out plaintiffs, and for the additional reasons discussed above, the Court does not regard inclusion of opt-out payments as the most appropriate method for valuing the common fund.

ii. Exclusion of Opt-Out Payments

A second alternative advanced by Petitioners results in a common fund of $365,000,000.[33] This figure includes the actual recovery by this class, $242,000,000, and the combined attorneys' fee funds, $123,000,000, but excludes payments to opt outs. Under this

[33] Under Petitioners' calculation, the total fund is $370 million. Findings ¶ 85. This calculation errs by $5 million.

tabulation, Petitioners' fee comprises approximately 33.7% of the common fund. As discussed further below, the Court regards this as a sound method for assessing the value of the common fund, with one slight modification to the proposed valuation method.

c. Other alternatives

Petitioners do not present the following calculations for the Court's consideration, but there are other options for determining the amount of the common fund. First, this Court could assess the common fund as including only those amounts actually recovered by Class Plaintiffs, $242,000,000, excluding both the combined attorneys' fee funds and the payments to opt outs. Under this calculation, Petitioners' fee comprises approximately fifty-one percent of the common fund. However, the Court does not regard this as the most appropriate valuation method. Courts in other jurisdictions have recognized that in constructive common fund cases, where attorneys' fees are borne by defendants and not plaintiffs, that the attorneys' fees nonetheless are a valuable part of the settlement and thus fairly characterized as part of the common fund. See Johnston, 83 F.3d at 246; In re General Motors, 55 F.3d at 802 (noting that the first edition of the Manual for Complex Litigation provided that fees "paid by the defendant(s) are properly part of the settlement funds"). This Court agrees. However, while the Court feels that it is appropriate to regard the attorneys' fees as comprising part of the constructive common fund, the Court does not feel that it is appropriate to collapse the Vitamin Products and Choline Chloride Funds into one large common fund for the purposes of evaluation, given the unique attributes of this Settlement and the separate provisions for attorneys' fees for Vitamin Products and Choline

Chloride. Therefore, the Court will assess the reasonableness of the Vitamin Products and Choline Chloride fees individually against the totals of the respective Settlement Funds. This alternative would seem best suited for making a true determination of the reasonableness of Petitioners' fee request.

Under this approach, the calculation for Choline Chloride is not problematic. The Settlement provides for a fee in the amount not to exceed fifteen percent of BASF's total contribution, thus far $5,000,000, to the Choline Chloride Settlement Fund, Settlement ¶ 17(g), which is precisely what Petitioners seek, i.e., $750,000. With regard to the Vitamin Products Settlement Fund, Petitioners' requested Vitamin Products fee of $122,438,032 (the total fee amount requested, $123,188,032, less the $750,000 Choline Chloride Fee) comprises approximately one-third (34.06 %) of the resulting Vitamin Products common fund of $359,438,032 (actual recovery of $242,000,000, less the $5,000,000 choline chloride settlement, plus attorneys fees of $122,438,032). As discussed more fully below, the Court finds both of these percentages to be reasonable and thus will approve the total fee request of $123,188,032.

2. Determining what constitutes a reasonable percentage

Having established the amount of the common fund, the Court must utilize the percentage of recovery method to determine whether Petitioners' percentage recovery is reasonable. See Democratic Cent. Comm. of D.C. v. Washington Metro. Area Transit Comm'n, 303 F.3d 1568, 1573 (D.C. Cir. 1993) (per curiam) (noting the duty that courts have to determine an appropriate percentage in common fund cases). While fee awards in common fund cases range from fifteen

to forty-five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund. See id.; In re Aetna Inc. Sec. Litig., No. 1219, 2001 U.S. Dist. LEXIS 68, at *44 (E.D. Pa. 2001 Jan. 4, 2001) (finding thirty percent to constitute a reasonable award); see also In re Ampicillin Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that while the bulk of fee awards in antitrust cases are less than twenty-five percent, several courts have awarded more than forty percent of the settlement fund). In cases regarded as "mega-fund" cases, i.e. recoveries of $100 million plus, fees of fifteen percent are common. See Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp 2d 942, 989 (E.D. Tex. 2000) (surveying cases decided between 1993 and 1999). However, some courts have felt it appropriate to award a smaller percentage of larger recoveries. See In re Cedant Corp. Sec. Litig., 109 F. Supp. 2d 285, 292 (D.N.J. 2000) (discussing the vacated and remanded In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 572 (D.N.J. 1997)). In the instant action, the Choline Chloride recovery of fifteen percent is certainly well within the range of percentages deemed reasonable in comparable litigation. The Vitamin Products one-third percentage is admittedly at the high range of recoveries, but it does fall within the fifteen to forty-five percent range established in other cases. Nevertheless, in contrast to other mega-fund cases, the award is ostensibly disproportionate. Accordingly, the Court explains below why it deems the one-third award to be reasonable in this case.

While this Circuit has not yet developed a formal list of factors to be considered in evaluating fee requests under the percentage of recovery method, other jurisdictions have

delineated factors that courts are to consider in evaluating fee requests. For example, the court in Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), set forth several factors that courts should assess in evaluating the reasonableness of fees under the percentage of recovery method. These factors include: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." Id. at 195 n.1 (citing In re Prudential, 148 F.3d 283, 336-40 (3d Cir. 1998)); In re GM Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819-22 (3d Cir. 1995)).

The Tenth Circuit considers what has been called "the twelve Johnson factors," namely:

> [T]he time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the 'undesirability' of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Rosenbaum v. Macallister, 64 F.3d 1439, 1445 (10th Cir. 1995) (listing factors from Johnson v. Ga. Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974)).

After analyzing all of the above mentioned factors, the Court finds petitioners' fee request in this case to be reasonable. First, counsel in the instant Settlement have obtained for a class comprised of nearly 4,000 members one of the highest percentage recoveries recorded, in one of the largest antitrust settlements on record. Courts have regarded exceptional benefits to a large

class as grounds for a higher fee award. See In re Aetna, 2001 U.S. Dist. LEXIS 68, at *47; In re Rite Aid Corp. Sec. Litig., No. 992493, 2001 U.S. Dist. LEXIS 7432, at *73-75 (E.D. Pa. June 8, 2001); Cullen v. Whitman Med. Corp., No. 98CV4076, 2000 U.S. Dist. LEXIS 14434, at *26 (E.D. Pa. Oct. 3, 2000) (weighing size of fund, number of people, and the amount that each class member would recover). Second, the attorneys involved are among some of the most highly skilled in the country with extensive experience in similar class action litigation, as evidenced by the biographies submitted to the Court. The experience, skill and professionalism of counsel and the performance and quality of opposing counsel all weigh in favor of the requested fee. See In re Ikon, 194 F.R.D. at 194 (measuring the quality of representation by "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience, and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel"). Third, counsel completed a substantial portion of their investigation prior to the implementation of any government investigation into the alleged price-fixing conspiracy.[34] This factor also weighs in favor of the proposed fee. See In re Rite Aid, 2001 U.S. Dist. LEXIS 7432, at *74 (recognizing that the litigation was "far ahead of public agencies . . . which long after the institution of this litigation awakened to the concerns that plaintiffs' counsel first identified"). Finally, counsel achieved this Settlement expeditiously. While there was no lengthy litigation, counsel should

[34]Class Plaintiffs' counsel initiated their investigation into the bulk vitamin industry in 1997. Co-lead Decl. ¶ 15. Petitioners filed the first complaint on behalf of direct purchasers of vitamins in March 1998, alleging that the world's largest manufacturers of vitamins, vitamin premixes, and other bulk vitamins had engaged in nearly a decade of anti-competitive behavior in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Id. ¶ 16. In March 1999, the U.S. Department of Justice announced the first in a series of guilty pleas regarding the conspiracy. Id. ¶ 21. Settlement negotiations began in May 1999, prior to the announcement of the guilty pleas in that same month of Settling Defendants F. Hoffmann-LaRoche Ltd. and BASF AG. Id. ¶ 27.

not be penalized for achieving an effective and efficient settlement. See Gunter, 223 F.3d at 198 (recognizing that the purpose of the percentage of recovery method is to encourage early settlement and stating that the district court had erred in basing its denial of the fee upon the fact that the case was resolved without the need for trial). In addition to the above considerations, the complex legal and factual matters implicated by the Settlement weigh in favor of the requested fee. See In re Cendant Corp. Prides Litig., 243 F.3d at 738 (noting that "extensive time and effort exerted by the attorneys and the existence of complex legal and factual issues warranted higher fee awards"). These matters required counsel to conduct in-depth investigations for nearly one year prior to suit, interview witnesses, retain experts, and defend against various motions to dismiss. Mem. Supp. Petition at 6.

Notably, there are also no objections to the fee award. The attorneys' fees were negotiated after the parties agreed upon the class recovery amounts. Importantly, the proposed fee does not diminish Plaintiffs' recovery. See Duhaime v. John Hancock Mutual Life Ins. Co., 989 F. Supp 375, 379 (D. Mass. 1997) (reasoning that the arm's length fee negotiation, as well as the fact that the fee did not diminish class recovery, ameliorated traditional concerns, such as collusion and extortion, that exist in "clear sailing" fee agreements).

The Court is aware that in cases with large recoveries, some courts have accounted for economies of scale by awarding fees in the lower percentage range of eleven to nineteen percent. See Goldberger, 209 F.3d at 51-53; see also In re Prudential, 148 F.3d at 334 (agreeing with district court's explanation of general principle that as recovery amount increases the percentage award of fees decreases); In re Neoware Sys., Inc. Sec. Litig., 2000 U.S. Dist. LEXIS 11051, at *10 (E.D. Pa. 2000) (noting the inverse relationship between the size of the settlement and the

percentage of attorneys' fees); Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp 2d 942, 989 (E.D. Tex. 2000) (noting common recovery of fifteen percent in "mega-fund" cases, i.e., those cases with billion dollar plus recoveries); Gunter, 223 F.3d at 195 (suggesting giving less weight to factors assessed in determining reasonableness when settlement is extremely large);[35] but see In re Ikon, 194 F.R.D. at 197 (stating that a percentage reduction in large settlements penalizes attorneys who secure large settlements for their clients).

In discussing the inverse relationship between size of recovery and percentage fee awards, the court in In re Ikon commented:

> It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery. Nor does it give sufficient weight to the fact that "large attorneys' fees serve to motivate capable counsel to undertake these actions."

In re Ikon, 194 F.R.D. at 197 (cited with approval in In re Cedant Corp. Sec. Litig., 109 F. Supp. 2d at 294-95). The In re Ikon court also remarked that the sliding fee scale approach, "by which counsel is awarded ever diminishing percentages of ever increasing common funds . . . tends to penalize attorneys who recover large settlements," id. at 196, and declined to "reduce the requested award simply for the sake of doing so when every other factor ordinarily considered weighs in favor of approving class counsel's request of thirty percent." Id. This Court agrees that it is not fair to penalize counsel for obtaining fine results for their clients. Moreover, the Court notes that a one-third recovery is a common percentage arrived at in contingency fee cases.

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[35] These factors include size of the fund, number of persons benefitted, objections to the settlement or fee, skill of attorneys, complexity of the litigation, risk of non-payment, amount of time spent on case by counsel, and awards in similar cases. See Cullen, 223 F.3d at 195.

See In re Aetna, 2001 U.S. Dist LEXIS 68, at *44; In re Ikon, 194 F.R.D. at 194 (noting that "in private contingency fee cases, particularly in tort matters, plaintiffs' counsel routinely negotiate agreements providing for between thirty and forty percent of any recovery"). Since the percentage of recovery method is meant to simulate awards that would otherwise prevail in the market, the Court finds a one-third attorneys' fees recovery in this case to be reasonable. See In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d at 300 (evaluating "what the market pays in similar cases"); In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992) (stating that "[t]he object in awarding a reasonable attorney's fee . . . is to simulate the market").

D. Expenses

In addition to their fee request of $123,188,032, Petitioners also seek reimbursement for $3,260,744.35 in out-of-pocket expenses. With regard to expenses, "'[t]here is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from that fund.'" In re Cedant Corp. Sec. Litig., 109 F. Supp. 2d at 305 (quoting Lachance v. Harrington, 965 F. Supp 630, 651 (E.D. Pa. 1997)). Courts have routinely awarded expenses for which counsel would normally directly bill their clients. See e.g., In re Am. Bank, 127 F. Supp. 2d at 433 (noting that in securities class actions that counsel are entitled to reimbursement of expenses). However, "[c]ounsel are entitled to reimbursement only for those expenses incurred in the course of work that benefitted the class." In re Agent Orange, 818 F.2d at 238. "Attorneys are clearly not entitled to reimbursement of expenses where the request is for an amount which is excessive or otherwise noncompensable." In re Bausch & Lomb, 183 F.R.D. at 89 (quotation and citation omitted). "Where attorneys . . . have not demonstrated that costs were reasonably incurred, courts have routinely disallowed some or all of the request." Id. Items such as travel, communications, computerized research, and overtime are frequently assessed as "firm overhead" and subsumed in the award of attorneys'

fees. See id. at 90 (surveying cases from various federal district and circuit courts in which requests for costs were either reduced or outright denied).

In the instant action, Petitioners have submitted for the Court's review a two volume exhibit containing an individualized accounting of expenses incurred by each of the firms comprising Petitioners for the purposes of this request. The individual expenses range from less than $20 to over $1 million and include items such as expert fees, photocopying, phone calls, traveling, computer-based research, staff overtime, and $742,000 in contributions, actual and assessed, to what is labeled as a "Litigation Fund."[36] Petitioners request that the Court reimburse them for these expenses from the class recovery portion of the settlement funds.

The Court has a number of concerns with granting the full amount in expenses requested by Petitioners, at least on the basis of the record currently before the Court. First, unlike the requested fees, which are paid from a separate escrow account and do not diminish Plaintiffs' recovery, Petitioners request that the expenses be paid from the class settlement funds. Second, in reviewing Petitioners' request for expenses, the Court finds that the expenses listed in the supplemental exhibits total $3,253,643.45, and not the $3,260,744.35 requested by Petitioners. In addition, the Petitioners seek reimbursement for items that courts have frequently regarded as overhead and thus not compensable in a separate award of costs and expenses. Furthermore, Petitioners request reimbursement of nearly $750,000 for actual and assessed contributions to a Litigation Fund, but have provided the Court with no accounting of expenditures, unspent balance, and refunds, if any, made from this account. Moreover, Petitioners' request exceeds by over $1,000,000 the $2,000,000 expense request estimated in the Class Notices.

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[36]The Vitamins antitrust Litigation Escrow Fund ("Litigation Fund") is a checking account established on June 29, 1999 from which funds were drawn to pay for various litigation expenses. Sincavage Aff.

Given the myriad of ambiguities surrounding Petitioners' request for reimbursement of expenses, the Court will defer ruling on this portion of the Petition pending submission of additional documentation clarifying: (1) the discrepancy of $7,109.90 between the requested expenses and the total expenses delineated in the supplemental exhibits submitted to the Court; (2) the nature of the Litigation Fund, accounting for actual, as opposed to merely assessed contributions to the fund, an accounting of expenditures paid from this fund, and an accounting of funds, if any, not spent and refunded to contributors to the fund; and (3) a further accounting of items for which Petitioners seek reimbursement, accompanied by an explanation as to why the Court should not regard such items as overhead and adequately provided for in the already generous award of attorneys' fees.

III. CONCLUSION

Based upon the foregoing reasons, the Court determines that Petitioners' fee request is reasonable and thus will approve payment of attorneys' fees in an amount of $750,000 for Choline Chloride Fees and $122,438,032 for the Vitamin Products fee, for a total of $123,188,032, plus interest. However, the Court will defer ruling on Petitioners' request for reimbursement of expenses in the amount of $3,260,744.35 pending submission of further documentation as described herein. An order will accompany this opinion.

July 13th, 2001

Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: VITAMINS ANTITRUST LITIGATION	)	
	)	**Misc. No. 99-197 (TFH)**
	)	**MDL No. 1285**
THIS DOCUMENT RELATES TO: ALL CLASS ACTIONS	)	

FILED
JUL 16 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER Re:
PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Class Plaintiffs and their counsels' Petition for Award of Attorneys' Fees in the amount of $123,188,032 plus interest is **GRANTED**. It is further hereby

ORDERED that within thirty days of this Order petitioners will submit further documentation with respect to their Petition for Reimbursement of Expenses as described in the Memorandum Opinion.

July 13th, 2001

Thomas F. Hogan
Chief Judge